Filed June 17, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Nos. 836 and 978 (Consolidated).

CHARLES P. BARRETT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ON WRIT OF ERROR TO THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FOR THE DISTRICTS OF SOUTH CAROLINA.

Brief for Plaintiff in Error.

CHARLES C. LANCASTER,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Nos. 53 and 175 (Consolidated).

CHARLES P. BARRETT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

On Writ of Error to the Circuit and District Courts of the United States for the Districts of South Carolina.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASES.

These two cases, Nos. 53 and 175, being between the same parties and involving the identical legal questions, have, on motion of the United States Solicitor General, been consolidated and ordered to be heard together as one case.

At a term of the United States Circuit Court held on the 4th Monday in November, 1894, in the city of Columbia, in the county of Richland, in the State of South Carolina, which is in the eastern district of that State, two indictments were found against Charles P. Barrett *et. al.*, for conspiracy, in violation of section 5440 of the United States Revised Statutes, which is an infamous offense. The grand jury that found the indictments were drawn from both the eastern and western districts of said State, and they charge the offense to have been committed in Spartanburg County, which is in the western district.

During that term only one of the cases was tried. The petit jury were drawn from both the eastern and western districts. Defendant Barrett was convicted and sentenced, and prosecuted a writ of error to the Supreme Court, which is No. 53 on the calendar.

The other indictment, during the same session, was remitted to the United States district court for the western district of South Carolina, and at the February, 1895, term thereof, at Greenville, South Carolina, defendant Barrett was tried, convicted and sentenced, and sued out a writ of error to the Supreme Court, which is No. 175 on the calendar.

The two cases are practically identical, the difference being that No. 53 was tried in the *circuit* court, in the eastern district, by a petit jury drawn from both the eastern district and western districts on an indictment found by a grand jury drawn from both the eastern and western districts, while *No. 175* was tried in the *district* court in the *western* district by a petit jury drawn from the *western* district, on an indictment found by a grand jury drawn from both the eastern and western districts of South Carolina.

The testimony in both cases tended to show that several offenses of conspiracy, if any at all, had been committed, in some of which defendant Barrett was not implicated; while in others he was implicated with some of the defendants at one time and place in one conspiracy, and with certain of the other defendants at another time and place in another and separate conspiracy.

The record fails to show:

First.—That the judge ordered a *venire* to issue for a grand jury, or that a *venire* was in fact issued for either the grand or petit juries, or that a grand jury found the indictments in these two case.

Second.—That the defendant was arraigned.

Third.—That he was present at the rendition of the verdict.

Fourth.—That he was present when sentence was pronounced.

The Exceptions and Assignments of Error Present Two Questions.

First.—Did the trial courts have jurisdiction of the cases?

Second.—Should the trial court have required the district attorney to elect on which one of the separate and distinct conspiracies he would ask for a conviction?

The Record Also Presents Three Other Questions.

First.—Should the record affirmatively show that a *venire* for the grand jury was ordered by the judge, that it was in fact issued for the grand and petit juries, and that a grand jury of not less than sixteen and not more than twenty-three persons found the indictments in these two cases.

Second.—Should the defendant have been arraigned?

Third.—Should the defendant have been present at the rendition of the verdict and the sentence of the Court?

ASSIGNMENTS OF ERROR.

IN CASE NO. 53.

I.

That the Court erred in overruling the defendant's challenges to both the grand and petit jurors, the alleged offense being charged in the indictment to have been committed in the county of Spartanburg, in the western district of South Carolina, and the panels of both the grand and petit jurors being drawn from both the eastern and western districts of said State.

II.

That the Court erred in overruling the demurrer of the defendant to the indictment, the alleged offense being charged in the indictment to have been committed in the county of Spartanburg, in the State of South Carolina, the same being in the western district of said State, and the indictment being found in the city of Columbia, in the county of Richland, in the eastern district of said State, at a time, namely, on the

day of November, 1894, not authorized by law for the sitting of any court of the United States for the western district of South Carolina.

III.

That the Court erred in overruling the defendant's plea to the jurisdiction of the court, the alleged offense being charged in the indictment to have been committed in the county of Spartanburg, in the western district of South Carolina, and the trial was had in the city of Columbia, in the county of Richland, in the eastern district of said State.

IV.

That the court erred in not requiring the United States attorney, at the close of the testimony, to elect on which one of the alleged conspiracies he would rely for a conviction, the evidence showing that several conspiracies, if any at all, had been committed, in some of which the defendant Barrett was not implicated; while in others he was implicated with some of the defendants at one time and place in one conspiracy, and with certain of the other defendants at another time and place in another and separate conspiracy.

V.

That the Court erred in not arresting the judgment, the grand and petit jurors being drawn from both the eastern and western districts, instead of from the western district alone; the indictment being found in the city of Columbia, in the county of Richland, in the eastern district of South Carolina, although the alleged offense is charged in the indictment to have been committed in the county of Spartanburg, in the western district of said State; the trial itself having taken place, not in the western district of South Carolina, the place of the alleged commission of the offense, but in the city of Columbia, in the county of Richland, in the eastern district of said State, and at a time not authorized by law for any court of the United States to sit in the western district of said State.

ASSIGNMENTS OF ERROR.

In Case No. 175.

I.

That the Court erred in overruling the demurrer of the defendant to the indictment, it appearing on the face thereof that the crime was committed in the county of Spartanburg, in the western district of South Carolina, when the same was found in the city of Columbia, in the county of Richland, in the eastern district of said State, and at a time, namely, on December 3, 1894, not authorized by law for holding any court of the United States for the western district of South Carolina.

II.

That the Court erred in overruling the defendant's plea to the jurisdiction of the court, the grand jury that found the indictment having been drawn, summoned and empaneled from both the eastern and western districts of said State; and said indictment having been found in a circuit court held in the city of Columbia, in the county of Richland, in the eastern district of said State, and was remitted to the district court for the western district of said State.

III.

Third Assignment of Errors in Case No. 175. (Omitted to be printed in the abbreviated records.)

The Court erred in not requiring the Attorney of the United States, at the close of the testimony in this case, to elect on which one of the five separate and distinct conspiracies proven to have been committed that he would rely for a conviction, the testimony showing that there were five different conspiracies committed at different times by different parties—that is to say, a separate conspiracy by defendant Barrett and defendant Burdine at one time and place; a separate conspiracy by defendant Barrett and defendant Evins at another time and place; a separate conspiracy by defendant Barrett

and defendant Neighbors at another time and place; a separate conspiracy by defendant Barrett and defendant Wyatt at another time and place; and a separate conspiracy by defendant Barrett and defendant EcElrath at another time and place.

IV.

That the Court erred in not arresting the judgment, the grand jurors that found the indictment having been drawn, summoned and empaneled from both the eastern and western districts of South Carolina, when the offense is charged to have been committed in the county of Spartanburg, which is in the western district of said State; the indictment having been found at a time and place not authorized by law for the holding of any court of the United States in the western district of South Carolina, namely, in December, 1894, in the city of Columbia, in the county of Richland, in the eastern district of said State, and the indictment having been remitted to the district court for the western district of South Carolina.

BRIEF OF ARGUMENT.

FIRST POINT.

The First, Second, Third, and Fifth Assignments of Error in Case No. 53, and the First, Second, and Fourth Assignments of Error in Case No. 175 present the Question of the Jurisdiction of the Court Below to Try these Cases.

I.

Both indictments were found at a circuit court for the eastern district of South Carolina, which convened at Columbia, in the county of Richland, in the State of South Carolina, on the 4th Monday in November, 1894. There is no question but what that is in the *eastern* district, if, in fact, there are two *districts*.

Each indictment charges the offense to have occurred in Spartanburg county, South Carolina, which is in the *western* district, if there are two *districts*.

The trial in No. 53 occurred in Columbia. Juries were drawn from all over the State. No. 175 was remitted, agreeably to the circuit judge's exact language, to the "district court for the *western district* of South Carolina." The trial in this case occurred in Greenville, in the western district, and by a jury from that district.

The grand jurors that found the indictment were drawn from all over the State, from both districts.

There will be no dispute over the law that, both by the Constitution, as well as statutes passed in pursuance thereof, that it is indispensable that the trial (including the indictments) must have occurred in the district of the commission of the crime. But should that question arise, the authorities are all one way.

The Federal Constitution jealously guards trials by juries of the vicinage and near the defendant's home. Art. 3, Sec. 2, Subd. 3, of that instrument says:

"Trials shall be by jury, and shall be in the State where the crimes shall have been committed."

But as soon as Congress met (the first session of the first Congress) and passed the Judiciary Act, dividing the United States into districts (September 24, 1789) and establishing the United States courts, they then, on the very next day (September 25, 1789), passed Art. 6 of the Amendments to the Constitution, requiring the trial to occur both in the State and *district* wherein the crime was committed.

This shows conclusively in what sense the word "district" is meant to be used—a Federal judicial district, like the one referred to in the Judiciary Act. Story and Cooley, in their Commentaries on the Constitution, say so in unmistakable terms. So do the courts of the United States.

There being no question regarding the fact that both indictments, although laying the offense in the western district (Spartanburg Co., Sec. 546, U. S. Rev. Stat.) and the indictments having been found outside the territorial limits of that district (Richland Co.) and by grand jurors not drawn from

that district exclusively (but from the eastern as well), the court was without any valid indictment, and, of course, without any authority to hear the case.

The statutes passed in pursuance of the Constitution are in accord with it. The district court has jurisdiction of all crimes committed within their respective districts.

U. S. Rev. Stat., Sec. 563.

The circuit courts have jurisdiction of all crimes committed in the districts for which they sit.

Sec. 629, U. S. Rev. Stat., Subd. 20.

II.

There are Two Judicial District in South Carolina With a Circuit and District Court for Each District.

By the 2d section of the act of September 24, 1789, the United States was divided into thirteen districts, one to consist of the State of South Carolina and to be called South Carolina district.

The 3d section provided that there be a court called a district court in each of the aforementioned districts, to consist of one judge who shall be called a district judge, and provided for the times and places of holding said courts.

The 4th section provided that the before mentioned districts shall be divided into three circuits and be called the eastern, the middle, and the southern circuit, and the southern circuit shall consist of the *districts* of South Carolina and Georgia, and that there shall be held annually in *each district* of said circuits two courts, which shall be called circuit courts, and shall consist of any two Justices of the Supreme Court and the *district* judge of *such districts.*

These sections clearly established a circuit court and a district court in the district of South Carolina.

In creating the circuit court the 4th section expressly provided that it shall consist of two Justices of the Supreme Court and the district judge of each district, so that the circuit court was confined to each district because it could not

exist without the district judge of each district, who was a component part of the court. The whole scheme of the judiciary act was to have a district and a circuit court in each district.

This is made manifest from the fact that the circuit court could not exist outside of the territorial limits of the district court and the district judge.

It therefore necessasily follows that where there was a district court and a district judge there necessarily was a circuit court.

This was the law when the act of February 21, 1823 (3 Stats, 726), was passed dividing South Carolina into two judicial districts—the eastern and the western.

This act specifically and in terms establishes a district court in each district with one district judge for both districts.

It therefore follows as a legal sequence that this act necessarily established a circuit court for each district for the reason that this act only amended the judiciary act, in that it made two judicial districts in South Carolina instead of one as heretofore, but it did not change that provision of section 4 of the judiciary act, which provided that there shall be a circuit court in each district (now the eastern and western) and shall consist of two Justices of the Supreme Court and the district judge of each district (now the eastern and western districts of South Carolina).

This proposition is so clear that it amounts to demonstration.

While this legislation fails to provide for sessions of the circuit court in the western district, owing no doubt to the paucity of business in that rural part of the State, yet this does not impair, much less destroy, the existence of the circuit court itself.

Toland *vs.* Sprague, 12 Pet., 328.
Raildoad Co. *vs.* Railroad Co., 15 How., 243.

This was the condition of the district and circuit courts in the eastern and western districts of South Carolina for over thirty-three years up to the act of August 16, 1856 (11 Stats., 43).

During this period and extending to 1858 divers acts of Congress were passed regulating the sessions of the courts in the eastern and western districts of South Carolina, but in no way affecting the judicial districts in which the words "district of South Carolina," "State of South Carolina, and simply" South Carolina are indifferently used in referring to the courts in the eastern and western districts.

See act May 25, 1824; act March 3, 1825; act May 4, 1826; February 24, 1829; March 1, 1845; August 16, 1856; and February 10, 185—.

By the act of August 16, 1856, the district court for the western district of South Carolina was vested with circuit court powers, thereby obviating the necessity of providing sessions of the circuit court in that district, since a district court with circuit court jurisdiction is in legal contemplation a circuit court.

Exparte Insurance Co., 18 Wall., 417.

This embraces the whole of the legislation affecting the courts of the United States in South Carolina at the adoption of the Revised Statutes June 22, 1874.

For a full exposition of the law on this subject prior to the adoption of the Revised Statutes of the United States, the attention of the Court is invited to the very learned argument of General Edward McCrady, an eminent lawyer of South Carolina, written in 1872, and found in the appendix to 3 Hughes Reports, 665.

III.

Sections of the Revised Statutes Pertaining to the District and Circuit Courts for the Eastern and Western Districts of South Carolina.

If there were the shadow of a doubt regarding there being two judicial districts in South Carolina with a district and circuit court in each at the time of the adoption of the Revised Statutes of the United States, every vestige thereof will be dispelled by an examination of the following sections relative to that subject:

SECTION 530. "The United States shall be divided into judicial districts as follows:

SEC. 531. "The States of California, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont, and West Virginia, each, shall constitute one judicial district." (Twenty in all. South Carolina is not named.)

Here follows the other States in the Union—those that are divided into two or more districts—(17 in number) and they go on down in alphabetical order till you get to South Carolina.

SEC. 546. "The State of South Carolina is divided into two districts, which shall be called the eastern and western districts of the district of South Carolina. The western district includes the counties of Lancaster, Chester, York, Union, *Spartanburg*, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens, and Fairfield, as they existed February 21, 1823. The eastern district includes the residue of said State."

SEC. 551. "A district judge shall be appointed for each district, except in the cases hereinafter provided. Every such judge shall reside in the district for which he is appointed. * * *

SEC. 552. "There shall be appointed in each of the States of Alabama, Georgia, Mississippi, South Carolina and Tennessee, one district judge, who shall be district judge for each of the districts included in the State for which he is appointed, and shall reside within some one of the said districts. * * *

SEC. 571. "The district courts for the western district of Arkansas, the northern district of Mississippi, *the western district of South Carolina*, and the district of West Virginia shall have, in addition to the ordinary jurisdiction of district courts, jurisdiction of all causes, except appeals and writs of error, which are cognizable in a circuit court.

This section establishes in South Carolina a circuit court for the western district in fact and in law, though not in name.

Exparte Insurance Co., 18 Wall., 417.

SEC. 572. "The regular terms of the district courts shall be held at the times and places following:" (At page 101) "In the eastern district of South Carolina, at Charleston, on the first Monday in January, May, July and October. In the western district, at Greenville, on the first Monday in August.

SEC. 608. "Circuit Courts are established as follows: One for the three districts of Alabama, one for the eastern district of Arkansas, one for the southern district of Mississippi, and one for each district in the States not herein named; and shall be called the circuit courts for the districts for which they are established."

SEC. 563. "The district courts shall have jurisdiction as follows:

First. Of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts. * * * The punishment of which is not capital. * * *.

SEC. 629. "The circuit courts shall have original jurisdiction as follows: (Par. 20, page 112). Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein.

SEC. 658. "The regular terms of the circuit courts shall be held in each year, at the times and places following * * * (page 122): In the district of South Carolina, at Charleston, on the first Monday in April, and at Columbia on the fourth Monday of November.

SEC. 767. "There shall be appointed in each district, except in the middle district of Alabama, and the northern district of Georgia, *and the western district of South Carolina*, a person learned in the law, to act as attorney for the United States in such district. * * * The district attorney of the eastern district of South Carelina shall perform the duties of district attorney for the western district of said State.

SEC. 776. "This section is identical with section 767, save that this refers to the United States Marshals, while the other relates to United States attorneys.

SEC. 817. "The grand and petit jurors for the district court, sitting in the western district of South Carolina, shall be drawn from the inhabitants of said district who are liable, according to the laws of said State, to do jury duty in the courts thereof; and all jurors shall be drawn during the sitting of the court for the next succeeding term.

SEC. 1037. "Whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offense charged in the indictment is cognizable by the said district court. And in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court.

SEC. 1038. "Same relative to remitting case to circuit court 'of same district' when the district court thinks that important questions of law are involved."

This is all that the Revised Statutes say on the subject, and they demonstrate that there are two districts. But if there were any question in regard to the matter, it will be settled conclusively by this: June 27, 1866, the act of Congress was passed authorizing the appointment of a commission to codify the United States Statutes. This commission finished its work and submitted it to Congress. It is like the report of a legislative committee. It is styled "First Commissioner's Draft," and is abbreviated "1 Com. D." The commission, *in regard to South Carolina*, recommended that it be made *one district* with *two divisions*. Every section was framed in conformity to that idea. But when the matter came before Congress, that body refused to adopt that part of the commission's report, but, on the contrary, constituted *two districts*.

By reference to the "1 Com. D." and comparing the sections there with the corresponding sections in the United States Revised Statutes, it is very clear. This makes it certain that the matter of "Divisions" and "Districts" was expressly considered and as expressly made *districts* and not *divisions*. This also accounts for the singular phraseology in section 546 of the Revised Statutes, wherein the useless

and meaningless phrase "of the district" in the second line thereof occurs.

Abstract from First Commissioners' Draft to Codify the Statutes of the United States.

This draft (p. 301), under chapter 1 "of Judicial Districts," sections 1 and 2, puts South Carolina as *one district.*

Here follows section 17, corresponding to section 546, R. S.:

"The *district* of South Carolina is divided into two *divisions*, which shall be called the eastern and western *divisions* of the district of South Carolina. The western *division* includes the counties of Lancaster, &c., as they existed February 1, 1823. The eastern *division* includes the residue of said State."

IV.

Acts of Congress Affecting the Courts and Judicial Districts of South Carolina Passed Since the Adoption of the Revised Statutes of the United States.

Act of January 31, 1877, ch. 41, 19 Stats., 230, amending among other sections of the Revised Statutes, section 571, by adding "eastern district of Arkansas." This act divided Arkansas into two districts; hence the change. South Carolina was again recognized as having two judicial districts.

Act of February 6, 1889, ch. 113, 25 Stats., 655, abolishes circuit court power of the district court, and establishes among other things a circuit court of the United States for the western district of South Carolina, and provides for the sessions of said circuit court.

Act of April 26, 1890, ch. 165, 26 Stats., 71, regulating the sitting of courts of the United States within the district of South Carolina.

Act of July 23, 1892, ch. 235, 27 Stats., 261, providing for a May term of the district court of the United States for the Eastern district of South Carolina.

Act of May 28, 1896, ch. 252, 29 Stats., pp. 140, 180, 182, making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year end-

ing June 30, 1897, and fixing the salaries of the United States attorney and marshal for the eastern and western district of South Carolina.

Act to appoint a United States attorney and marshal for the western district of South Carolina passed the Senate unanimously on January 7, 1897 (S. 811), Cong. Record of January 7, 1897, p. 548, *et seq.*

In the debate on the passage of this bill, Senator Hoar, chairman of the Judiciary Committee of the Senate, says there are two judicial districts in the State of South Carolina.

Attorney General Harmon, in an official opinion to Representative (now Senator) McLaurin, of South Carolina, of date February 29, 1896, which is published in the Congressional Record, March 4, 1896, page 2736, says there are two districts in South Carolina.

Circuit Judge Simonton, in remitting case No. 175 from the *circuit* to the *district* court expressly says to the "district court for the western district in South Carolina." (Printed Record, pp. 1, 2.)

This legislation clearly affirms and reaffirms the legislation contained in the Revised Statutes which established two separate and distinct judicial districts in South Carolina, with a district and circuit court in each.

V.

It may be Contended by the Defendant in Error that the Act of April 26, 1890, Ch. 165, 26 Stats., 71, Abolished Two Judicial Districts and Created Only One District for the State.

An examination of this legislation will clearly show that this contenion is erroneous. It cannot be denied that up to the time of the passage of the said act there were two judicial districts in South Carolina with a circuit and district court for each.

The object of the act was to fix the time and places of the terms and sittings of all the United States courts in South

Carolina and not to rearrange the districts or the courts therein.

The act, as its title indicates, is "to regulate the sittings of the courts of the United States" in South Carolina. This is manifest from the fact—

1. Two additional terms were provided for in Greenville—one a district and the other a circuit court—on the first Monday in February.

2. A session was provided for the district court in Columbia on the fourth Monday in November.

3. The time of holding the spring term of the district court for the eastern district in Charleston was changed from the first Monday in May to the first Monday in April.

4. The October term of the district court in Charleston was dispensed with.

The whole object and intention of Congress in passing the first section of said act was to regulate the terms of the circuit courts for the State and not to change the judicial districts, and this is made manifest when taken in connection with sections 3 and 4 of said act, which expressly and in terms provide for the regular terms of the district courts for the eastern and western districts.

It would be stretching the rule of statutory construction far beyond any known precedent to hold that Congress in this act by indirection abolished the judicial districts for the circuit courts and without any apparent reason retained the two judicial districts for the district courts.

To admit that this act abolished two districts for the circuit court, it must also be conceded that it repealed the acts of June 30, 1879, 21 Stats., 43, regulating the drawing of grand and petit jurors and the appointment of a jury commissioner for each judicial district, as well as the act of February 6, 1889, 25 Stats., 655, which deprived the district court for the western district of circuit court powers and established in terms a circuit court for said western district.

What, then, becomes of the jury commissioner and clerk

of the circuit court for each district, and the records of said courts?

By the provisions of section 1037, Rev. Stats., the circuit court on motion of the district attorney may remit any indictment pending therein to the next session of the district court of the *same* district, where the offense charged in the indictment is cognizable by the said district court. And in like manner any district court may remit to the next session of the circuit court of the *same* district any indictment pending in the said district court.

If the contention of the defendant in error be sound that there is but one district in South Carolina of the circuit conrt, then it follows as as a legal conclusion that the circuit court for the district of South Carolina violated the provisions of section 1037, Rev. Stat., in remitting case No. 175 to the district court for the *western* district of South Carolina, for the plain reason that the western district of South Carolina is not the *same* district as the district of South Carolina, but a separate and distinct district with separate and distinct powers and territorial limits.

If it be contended, however, that the Act of 1890 repealed section 1037, Rev. Stats., under what provision of law did the circuit court for the district of South Corolina, on motion of the district attorney, remit case No. 175 to the district court for the western district of said State?

It is submitted there was no existing law giving the circuit court any such power.

VI.

Each Section of an Act of Congress Shall Contain but a Single Proposition of Enactment.

The first section of the act of 1890 provides for the regular terms of the circuit courts in South Carolina. If said section also provides that there shall hereafter be but one district for the circuit court in said State, it violates the provision of section 10, Rev. Stats., and is contrary to the policy of Congress that each section of an act shall contain a single proposition of enactment.

VII.

Laws Cannot be Repealed by Inferences or Implications.

"It is supposed that the legislature would not make so important an innovation without a very explicit expression of its intent."

Black on Stats., sec. 55, p. 123.
Maxwell on Stats., p. 152.

If it is to be inferred that Congress supposed when this act was passed that the State of South Carolina contained only one judicial district, the supposition cannot be accepted as equivalent to a legislative act, or as indicating a purpose to change or abolish the districts of said State.

In Postmaster General *vs.* Early, 12 Wheat., 136, 148, Chief Justice Marshal, in construing an act of Congress, lays down the doctrine that "a mistaken opinion of the legislature concerning the law does not make law."

U. S. *vs.* Claflin, 97 U. S., 546, 548,
Ottawa *vs.* Perkins, 94 U. S., 260, 270.
District *vs.* Hutten, 143 U. S., 18, 27, 28.
20 Opinion Attorney General, 530, 532.

Laws cannot be changed or repealed by mere inferences or implications, especially where the life or liberty of the citizen is affected.

In re Bonner 151 U. S., 256, 257, Justice Field, in deciding a similar question, says: "That in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of the proceedings, and its authority in these particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms."

This doctrine has been squarely reaffirmed in

Post *vs.* U. S., 161 U. S., 585.
Rosecrans *vs.* U. S., 165 U. S., 257, 263.

In the latter case, Justice Brewer says:

"When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter, that express legislation must control in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation."

This construction of the act of 1890 is fully sustained by an official opinion of Attorney-General Harmon found in Cong. Record of March 4, 1896, p. 2736, as follows:

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., February 29, 1896.

SIR: With reference to the question whether there are two judicial districts in South Carolina or only one, I beg to say that I have caused an examination to be made with the following result:

When the first register of this Department was prepared, in 1888, Mr. Jenks, then Solicitor-General, examined the question, which was brought to his attention by the appointment clerk, and advised that South Carolina be entered therein as a single district, which was done and has been repeated in subsequent issues.

I learn further that the question arose at the commencement of President Harrison's term and was considered by Attorney-General Miller, but I am unable to find any record of the conclusion he reached, if he reached any. The practice, however, has grown up of considering the State as a single district in all matters connected with the judicial affairs of that State, including appointments to office. Various acts of Congress refer to the State as a single district, although they also mention it as two districts. For instance, the act of April 26, 1890 (26 Stat., 71), is entitled "an act to regulate the sitting of the courts of the United States within the district of South Carolina," yet sections 3 and 4 speak of eastern and western districts. But it is useless to multiply instances. I am unable to find anything in the statutes which affects the provisions of sections 546 and 767, Revised Statutes, which divide the State into two districts. I think, therefore, that you should call the attention of the Judiciary Committee to this matter and have the bill amended to fit the case.

Very respectfully,

JUDSON HARMON,
Attorney-General.

Hon. JOHN L. MCLAURIN,
House of Representatives.

This view of the law was adopted by Congress in the passage of the act of May 28, 1896, 29 Stats., 180, 182, then under consideration.

VIII.

There Being Two Judicial Districts for the Circuit and District Courts in South Carolina, the Courts were without Jurisdicton, and the Indictments in these Cases were Null and Void.

On the face of the indictments it appears and cannot be controverted that the offenses were committed in Spartanburg county in the western district. It also appears that the indictments were found in the city of Columbia, which is in Richland county in the eastern district, by jurors drawn from both of the said districts.

It further appears that the trial in case No. 53 took place in Columbia by a petit jury drawn from both districts.

The question of law here involved is clear and unanswerable. In criminal cases the jurors must be drawn from the vicinage—the State and district within which the crime was committed.

Art. 3, sec. 2, subd. 3, of the Constitution provides that "the trial of all crimes * * * shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed."

The sixth amendment to the Constitution provides:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and *district* wherein the crime shall have been committed, which district shall have been previously ascertained by law.

Section 563, Rev. Stats., provides that the district courts shall have jurisdiction "of all crimes and offenses cognizable under the authority of the United States committed within their respective *districts*."

Section 629, par. 20, Rev. Stats., gives to circuit courts "exclusive cognizance of all crimes cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein."

"The judiciary act has divided the United States into judicial districts." Within these districts a circuit court is

required to be holden. The circuit court for each district sits within and for that district and is bounded by its local limits.

Toland *vs.* Sprague, 12 Pet., 328.
Railroad Co. *vs.* Railroad Co., 15 How., 243.

Jurisdiction is coextensive with the territorial limits of the district.

Rosecrans *vs.* U. S., 165 U. S., 260.

The jury must be summoned from the vicinage—the district where the crime is supposed to have been committed.

Cooley on Const. Lim., sec. 319.

SECOND POINT.

The Fourth Assignment of Error in Case No. 53 of the Abbreviated Printed Record and the Third Assignment of Error in Case No. 175 of the Original Record Raise this Question: Did the Trial Court Err in not Requiring the District Attorney at the close of his Testimony to Elect on which one of the Separate and Distinct Conspiracies he would Rely for a Conviction?

I.

CASE No. 53.

Fourth Bill of Exceptions. (Omitted to be printed in the abbreviated record.)

"Be it remembered that, after the United States Attorney had closed his case, the said defendant moved the Court, that since the testimony had disclosed the fact that at least four conspiracies, if any at all, had, been proven, in some of which defendant, Chas. P. Barrett, was not implicated, and in others he was implicated with certain of the defendants, while in still others, he was implicated with certain of the defendants at one time and place and with different defendants at another time and place, the Attorney of the United States be required to elect on which one of the alleged conspiracies he would ask for a conviction. This motion was overruled by the Court, to which ruling the said defendant, by counsel, excepted and offered this, his fourth Bill of Exception, and prayed that it be signed, sealed, and made a part of the record, which is accordingly done.

WM. H. BRAWLEY,
U. S. Judge."

[L. S.]

Fourth Assignment of Error. (See printed record, page 5.)

"That the Court erred in not requiring the United States Attorney, at the close of the testimony, to elect on which one of the alleged conspiracies he would rely for a conviction, the evidence showing that several conspiracies, if any at all, had been committed, in some of which the defendant Barrett was not implicated; while in others he was implicated with some of the defendants at one time and place in one conspiracy, and with certain of the other defendants at another time and place in another and separate conspiracy."

CASE NO. 175.

Third Bill of Exceptions. (Omitted to be printed in the abbreviated record). "After the Attorney of the United States had closed his case, the defendant, Chas. P. Barrett, moved the Court that, as the testimony showed that five separate and distinct conspiracies had been committed—one by defendant Barrett with defendant Burdine at one time and place; one by defendant Barrett with defendant Evins at another time and place; one by defendant Barrett with defendant Neighbors at another time and place; one by defendant Barrett with defendant Wyatt at another time and place; and another by defendant Barrett with defendant McElrath at another time and place; and there being no proof connecting the defendants Burdine, Evins, Neighbors, Wyatt and McElrath with any of the others, save defendant Barrett, that the Attorney of the United States be required to elect on which one of the conspiracies he would ask for a conviction. The Court overruled all these objections and also the motion in arrest of judgment. To which rulings the defendant Barrett duly excepted and offered the above four bills of exceptions, and prayed that they be signed, sealed, and made a part of the record, which is accordingly done." (See printed Record, page 4.)

Third Assignment of Errors in Case No. 175. (Omitted to be printed in the abbreviated record.)

"The Court erred in not requiring the Attorney of the United States, at the close of the testimony in his case, to

elect on which one of the five separate and distinct conspiracies proven to have been committed that he would rely for a conviction, the testimony showing that there were five different conspiracies committed at different times by different parties, that is to say: A separate conspiracy by defendant Barrett and defendant Burdine at one time and place; A separate conspiracy by defendant Barrett and defendant Evins at another time and place; a separate conspiracy by defendant Barrett and defendant Neighbors at another time and place; a separate conspiracy by defendant Barrett and defendant Wyatt at another time and place; and a separate conspiracy by defendant Barrett and defendant McElrath at another time and place."

The indictments in both cases are for conspiracy in violation of section 5440, Rev. Stats. They each contain but one count. It is true that in the indictment in case No. 53 there are nominally two counts, yet practically but one, being two ways of stating the same offense, there being but one verdict and sentence. On the face of the indictments it does not appear that more than one offense was charged.

The record shows by the fourth Bill of Exceptions in case No. 53 and third Bill of Exceptions in case No. 175 above that there were four separate and distinct conspiracies in case No. 53; and five separate and distinct conspiracies in case No. 175; that in case case No. 53 the plaintiff in error was in no way connected or implicated in one or more of said conspiracies; that in case No. 175 the separate and distinct conspiracies were committed by separate and different defendants at different times and places.

At the trial below, upon the conclusion of the testimony for the prosecution, the defendant Barrett moved the Court to require the district attorney to elect on which one of the offenses he would rely for conviction, which was overruled and exception duly taken.

II.

MISJOINDER OF OFFENSES AND DEFENDANTS.

It is elementary that duplicity in an indictment is fatal, and equally so the misjoinder of defendants.

Duplicity is the joinder of two or more distinct offenses in one count and is bad.

1 Bish. New Crim. Proc., sect. 432.
Whart. Crim. Pl. and Pr., sect. 243.
State *vs.* Howe, 1 Rich., 261.

Joinder of defendants not permitted where the offenses are separate, the one defendant not being guilty of the same thing as the other.

1 Bish. New Crim. Pr., sect. 470.

In case of duplicity the prosecutor, at the trial, may be put to his election on which charge to proceed.

1 Bish. New Crim. Pr., sec. 470.

By the common law rule any number of offenses might be included in the same indictment, if in separate counts. But under no circumstances could a man be indicted for more than one offense in one count. If this appeared on the face of the indictment, it would be fatal on demurrer or on motion to quash. If it did not appear on the face of the indictment, but from the testimony presented at the trial, the Court would be compelled to put the prosecutor to his election.

By the provisions of the act of 1853 embodied in section 1024, Rev. Stats., the right to indict for separate offenses, even though in separate counts, was limited to three classes of cases; namely, 1st, when there are several charges against a person for the same act or transaction; 2d, or for two or more acts or transactions connected together, and 3d, or for two or more acts or transactions of the same class of crimes or offenses. Even then the court is invested with discretion to put the prosecutor to his election.

The effect of this legislation was to confine the cases in which a person could be tried for more than one offense, at one and the same time, within a very narrow compass, even where the crimes were charged in separate counts.

This doctrine is well settled.

Pointer *vs.* U. S., 151 U. S., 398.
Ingraham *vs.* U. S., 155 U. S., 436.
McElroy *vs.* U. S., 164 U. S., 76.

In the case at bar it is indisputable that the defendant Barrett, the plaintiff in error, was indicted in one case, No. 53, for four separate and distinct offenses in one count, and the other case, No. 175, he was indicted for five separate and distinct offenses in one count, and on the principles of law above set forth it was the duty of the Court, as matter of law, and not of discretion, to put the prosecutor to his election.

THIRD POINT.

Should the Record Affirmatively Show that a Venire for the Grand Jury was Ordered by the Judge; that it was in Fact Issued for the Grand and Petit Jurors, and that a Grand Jury of not less than Sixteen and not more than twenty-three Persons Found the Indictments in these Two Cases?

In case No. 53 the following is a true copy from the record on this point:

"Be it remembered that, heretofore, to wit, on Dec. 3, 1894, before the judge of said court, for the district of South Carolina, the said United States indicted Charles P. Barrett, *et al.*, in a bill of indictment filed by the United States Attorney, upon the affidavits and warrants, which bill is in the words and tenor following": * * *

(Here are proceedings before U. S. Com'r.)

"*Bill of Indictment.*

The United States of America, District of South Carolina.
In the Circuit Court.

At a stated term of the circuit court of the United States for the district of South Carolina, begun and holden at Columbia within and for the district aforesaid, on the fourth Monday of November, in the year of our Lord one thousand eight hundred and ninety-four, *the jurors of the United States of America*, within and for the district aforesaid, upon their oaths, respectively, do *present:* That Chas. P. Barrett (*et al.*), &c. &c.—"True Bill: J. Smith, foreman."

In case No. 175 the record is substantially the same and contains the following words: "The jurors of the United States of America."

The words "*grand jury*" nowhere appear in the indictment in either case.

It is indispensable that the judge of the court issue an order for the venire to issue for the summoning of a grand jury. Sec. 810, Rev. Stats.; U. S. *vs.* Autz, 16 Fed. Rep., 119.

Every grand jury empaneled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. Sec. 808, Rev. Stats.

Writs of venire were required at common law. If they were not issued a conviction was illegal.

Thomson and Merriam on Juries, sect. 70.
U. S. *vs.* Autz, 16 Fed. Rep., 119.

Writs of both grand and petit jurors are parts of the record of conviction. If they have not been issued, the accused has not been charged or convicted by the good and lawful men of the vicinage.

State *vs.* McMurray, 2 Speer (So. Ca.), 216.
State *vs.* Dozier, 3 Strob. (So. Ca.), 33.
State *vs.* Williams, 1 Rich. (So. Ca.), 188.

In the absence of a venire the judgment of conviction is absolutely void. No laches can cure the illegality.

Thomson and Merriam on Juries, sect. 551.
Miller *vs.* State, 33 Miss., 356.
People *vs.* Thurston, 5 Cal., 69.
Preston *vs.* State, 63 Ala., 127.
Barry *vs.* State, 63 *Id.*, 126.

Irregularities in drawing, summoning, or empaneling grand jurors may be waived by failure to move to quash or to plead in abatement. But where some fundamental requisite has not been complied with, the action of the grand jury is *coram not judice*, and objection may be taken by motion in arrest or on error.

Gales' case, 109 U. S., 65.
1 Bish. Crim. Proc., sect. 887, 888.
Harden's Case, 2 Rich. (So. Ca.), 533.

The venire, summoning, empaneling, and swearing of a grand jury, in addition to the fact the legal number found the indictment, are matters of substance and must be affirmatively shown by the record.

Shelp *vs.* U. S., 81 Fed. Rep., 701.

Before a court of last resort affirms a judgment of conviction of at least an infamous crime, it should appear affirmatively from the record that *every step necessary to the validity of the sentence has been taken.*

Crain *vs.* U. S., 162 U. S., 646.

FOURTH POINT.

DEFENDANT NOT ARRAIGNED.

The original record does not disclose the fact that the defendant was arraigned. In case No. 53 the original record contains the following and only statement of facts on this point:

"This case came up for trial December 6, 1894. The defendants being called, the following named defendants entered their plea of 'not guilty,' to wit: Charles P. Barrett, John S. Fisher, *et al.*"

In case No. 175 "the defendant appeared in his own behalf and pleaded 'not guilty.'"

The arraignment is an essential element in the trial of a felony or other infamous crimes, and the record must show this fact affirmatively. In capital or other infamous crimes an arraignment has always been regarded as matter of substance, and must be affirmatively shown by the record.

Shelp *vs.* U. S., 81 Fed. Rep., 701.

Before a court of last resort affirms a judgment of conviction of at least an infamous crime, it should appear affirmatively from the record *that every step necessary to the validity of the sentence has been taken.*

Crain *vs.* U. S., 162 U. S., 646.

The entry of the plea does not include the arraignment, as both are necessary steps to the validity of the sentence. Neither can the defendant expressly waive the arraignment in infamous crimes.

"That which the law makes essential in proceedings involing the deprivation of life or liberty, cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

Hopt *vs.* People of Utah, 110 U. S., 574.

This doctrine is affirmed by the Supreme Court in the following cases:

Schwab *vs.* Berggren, 143 U. S., 442.
Lewis *vs.* U. S., 146 U. S., 370.

FIFTH POINT.

The original record fails to show affirmatively that the defendant was present at the rendition of the verdict and the sentence of the Court.

"At common law no judgment for corporal punishment could be pronounced against a man in his absence."

Ball *vs.* U. S., 140 U. S., 118.

In the prosecution for a felony or infamous crime, it is essential to the protection of one whose life or liberty is involved that he shall be personally present at the trial—that is, at every stage of the trial—when his substantial rights may be affected by the proceedings against him.

If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.

Hopt *vs.* People of Utah, 110 U. S., 574.

The defendant could not waive his right to be present at every proceeding had during the trial, nor cure the error committed in disregarding the same by not objecting or saving an exception at the time.

Cooley Const. Lim., 319; Whart. Cr. L., sect. 3364.
Dougherty *vs.* Com., 69 Pa. St., 286.
Maurer *vs.* People, 43 N. Y., 1.
Dempsey *vs.* People, 47 Ill., 325.
People *vs.* Kohler, 5 Cal., 72.
Younger *vs.* State, 2 W. Va., 579.
Hopt *vs.* People of Utah, 110 U. S., 574.

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